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Thresholds of Private CERCLA Liability: Redefining “Necessary” Under Section 107(a)(4)(B)

JENNIFER I. FOX*

I. INTRODUCTION

In the effort to place the costs of massive hazardous waste remedial action squarely on the shoulders of the polluters,¹ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”)² has become associated with imposing an “octopus-like”³ liability scheme on potentially responsible parties (“PRPs”). As CERCLA says nothing on its face regarding a limit of liability on these (typically) substantial response costs, PRPs have sought ways to achieve limits on their liability through the courts in private actions.⁴

Liability thresholds can be set by placing a ceiling on the amount of responsibility each PRP assumes⁵ or by determining a “floor,” an amount below which the contributor is not considered a PRP. Floors in liability can be set either through reported quantities (e.g., one pound or ten pounds)⁶ or can be based on risk assessment of the costs or harms to human health and the environment. The establishment of risk-based thresholds on CERCLA liability, in which this Note is primarily interested, ensures that statutory responsibility imposed in private causes

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1. This is commonly known as the “polluter-pays” principle. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 804 (2d ed. 1998).

2. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1994 & Supp. IV 1998).

3. William D. Evans, Jr., *The “Cape Fear” Features of Superfund Contribution Litigation: The Available Remedies and Extent of Liability*, 75 MICH. B.J. 1170, 1170 (1996) (arguing that CERCLA’s scheme of “strict, retroactive, and joint and several liability is . . . unfair” and leads to high cleanup costs and soaring litigation expenses).

4. CERCLA provides a cause of action for not only the government, but also private third parties to recover response costs from PRPs. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1994). Claims for a limit to CERCLA liability have typically arisen as defenses in these private actions. *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

5. Courts have unequivocally refused to place a ceiling on potential CERCLA liability. Doing so would contradict both the goals behind the statute and the joint and several liability scheme. *See infra* notes 19-23 and accompanying text.

6. The Second Circuit has clearly provided that “quantity ‘is not a factor’ when determining CERCLA liability because had Congress wanted to distinguish liability on the basis of quantity, it would have so provided.” *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 517 (2d Cir. 1996) (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992)); *see also United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993) (“The statute on its face applies to ‘any’ hazardous substance, and it does not impose quantitative requirements.”).

of action is directly linked to potential harm caused by the defendant PRPs.

Several competing interests are central to the courts' decisions on whether to impose some threshold level of liability in these private cases. The interests of PRPs in avoiding substantial or inequitable response costs⁷ conflict with the public's interests in finding a solution to the environmental and health problems created by the numerous hazardous waste sites throughout the country⁸ and the government's interest in encouraging private parties to initiate remedial action.⁹ In light of these competing interests, courts have thus far stingily allowed de minimis thresholds to be placed on CERCLA liability but have exhibited contradiction and confusion on what mechanisms should be used to do so.

This Note explores the feasibility of limiting CERCLA liability by asserting threshold levels of remedial action. Part II begins with a background discussion on the history of CERCLA and then provides an enumeration of the liability and enforcement schemes. Part II also provides a step-by-step look at a private plaintiff's prima facie case in a CERCLA cause of action and the elements needed under the statute to establish liability. Part III explores a few of these different elements through which limits to CERCLA liability have been sought unsuccessfully and how these mechanisms interact with the three competing interests mentioned above. Sections A and B of this Part will focus on the "consistent with the national contingency plan" and "causation" elements under section 107(a)(4).¹⁰ Finally, in section C, this Note will explore and endorse the use of the court's definition of the term "necessary costs

7. By 1995, the Environmental Protection Agency ("EPA") had estimated that cleaning up the 1200 to 2000 most dangerous sites would cost approximately \$13.1 to \$22.1 billion, while the General Accounting Office ("GAO") raised that figure to \$32 billion. Evans, *supra* note 3, at 1170-71 (citing Stacey A. Kipnis, *The Conflict Between CERCLA and FIRREA: Environmental Liability of the Resolution Trust Corporation*, 39 UCLA L. REV. 439, 440 (1991)).

8. Immediately prior to Congress's enacting CERCLA in 1979, EPA estimated there were between 30,000 and 50,000 hazardous waste sites across the country. H.R. REP. NO. 96-1016, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120-21. In 1986, EPA's computerized tracking system, the Comprehensive Environmental Response, Compensation, and Liability Information System ("CERCLIS"), used to track toxic waste sites eligible for governmental CERCLA remedial action, changed this number to approximately 23,000 sites. Evans, *supra* note 3, at 1170. However, in 1988, the GAO estimated that a more comprehensive catalogue of all hazardous sites would show this number could actually increase to 425,380. *Hazardous Waste: GAO Finds 425,380 Potential Superfund Sites; Florio Hits EPA for Delays in Site Assessments*, 18 Env't Rep. (BNA) 2043 (Jan. 22, 1988).

9. Some commentators have noted that the government has neither the time, resources, nor the money to address anything but the most serious toxic waste sites, and therefore, the future of true hazardous waste cleanup lies in remedial actions initiated by private parties. See, e.g., Arnold W. Reitze, Jr. et al., *Cost Recovery by Private Parties Under CERCLA: Planning a Response Action for Maximum Recovery*, 27 TULSA L.J. 365, 368-69 (1991-92); Joseph A. Fischer, Comment, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA*, 30 HOUS. L. REV. 1979, 1990-93 (1994). To this end, it has been noted that easy recovery of response costs through the courts is the key incentive for these private responses. See Frank B. Cross, *The Dimensions of a Private Right of Action Under Superfund*, 19 CONN. L. REV. 193, 204 (1987); Fischer, *supra*, at 2015.

10. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607 (a)(4)(B) (1994).

of response" under section 107(a)(4)(B) of CERCLA to establish a threshold floor of liability based on risk assessment and efficient remedial action in *Southfund Partners III v. Sears, Roebuck & Co.*¹¹ This Note considers this provision the future vehicle for imposing a threshold floor on CERCLA liability and will explain how this mechanism balances the above-mentioned competing interests more so than any of the other previous methods.

II. BACKGROUND

In order to determine whether a threshold may feasibly be applied to CERCLA liability, the history of the statute and the reasons behind its enactment must first be understood. Similarly, a discussion of the statute's liability scheme will provide an understanding of the mechanisms used to impose attempted thresholds.

A. History of CERCLA

During the 1970s, events such as the first annual Earth Day celebration¹² and the increasing popularity of Rachel Carson's definitive work, *Silent Spring*,¹³ were bringing environmental concerns to the forefront of public awareness. Amidst this framework, the impetus to enact CERCLA was created as the media drew the public's attention to national hazardous waste disposal disasters, such as New York's Love Canal,¹⁴ and subsequently to the problem of persistent toxic waste.¹⁵

The lame-duck session of the Ninety-sixth Congress passed the final legislation as a final compromise between three then-existing bills.¹⁶ As such, CERCLA has often been cited as a law not only with an aggressive initiative, but also fraught with

11. 57 F. Supp. 2d 1369 (N.D. Ga. 1999).

12. The first Earth Day celebration was held in 1970.

13. RACHEL CARSON, *SILENT SPRING* (1962).

14. Love Canal is located in Niagara Falls, New York. See Brian Patrick Murphy, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 FORDHAM ENVTL. L.J. 587, 592 (2000). The original canal was built in the late nineteenth century but never completed. *Id.* Between the 1930s and 1950s, the site was used as a chemical waste dump, but in 1953, Hooker Chemical Company sold the land to the city for one dollar (rather than face confiscation through eminent domain). *Id.* The city and private developers built an elementary school and housing on the site. *Id.* In 1976, EPA and health officials began an investigation of the area due to chemical seepage into homes and abnormally high rates of birth defects, cancer, miscarriages, and underweight children in the vicinity. *Id.* Eventually, the school was closed and the area evacuated and deemed uninhabitable. *Id.* at 592-93. Vocal and widespread media coverage of the disaster led to a national public outcry that the government do something to hold responsible industries liable for this type of contamination. *Id.* at 593.

15. See Richard Roth, *Long-Buried Poisons Ooze out of the Ground*, WASH. POST, Aug. 5, 1978, at A2.

16. The three bills contributing to CERCLA's enactment were H.R. 7020, 96th Cong. (1980), H.R. 85, 96th Cong. (1979), and S. 1480, 96th Cong. (1979). Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 2 (1982).

inconsistencies, redundancies, and vagueness.¹⁷ The legislative history accompanying CERCLA does not provide much interpretive insight into the statutory gaps, as the explanations are sparse and the language fragmented and unclear.¹⁸

This has left the courts with the task of filling in the statutory holes. Over the past twenty years, they have done so with a vengeance, broadly construing the government's authority and the liability scheme in the interests of CERCLA's aggressively stated goals.¹⁹

CERCLA has two recognized primary goals. First, it seeks to provide a quick and efficient method of cleaning up dangerous, abandoned, or inactive hazardous waste sites.²⁰ Second, CERCLA attempts to impose remedial²¹ liability for improper waste disposal practices on responsible parties, rather than burdening taxpayers, when a third party (either the government or a private entity) initiates cleanup measures.²²

B. CERCLA's Liability and Enforcement Schemes

Pursuant to these goals, the courts have read into CERCLA a strict, joint and several liability scheme.²³ In other (simplified) words, any person or entity fitting the

17. Cf. PLATER ET AL., *supra* note 1, at ch. 18.

18. Evans, *supra* note 3, at 1171; Grad, *supra* note 16, at 2; *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1485 (1986); see also Cross, *supra* note 9, at 201 (remarking that the legislative history is a "largely fruitless" addition to the analysis of private cost recovery because it only directly mentions this type of recovery once).

19. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

20. See ENV'T & NATURAL RES. POLICY DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, sec. V (Comm. Print 1983), WL A&P CERCLA COMM. PRINT 1983 (recognizing that attention focused on the cleanup of hazardous waste dumps was the driving force behind the law); Stephen N. Moelis, *CERCLA and Lender Liability: Why the Search for "Deep Pockets" Leads to Small Change*, 12 CARDOZO L. REV. 213, 215 (1990); see also Karen L. DeMeo, Note, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 496-98 (1994).

21. See DeMeo, *supra* note 20, at 496-97. "CERCLA is not a regulatory law. Rather, its mission is responsive, mandating cleanup action at polluted sites." *Id.* at 496 n.10.

22. See Evans, *supra* note 3, at 1171; Moelis, *supra* note 20, at 215; DeMeo, *supra* note 20, at 496-97. But see DeMeo, *supra* note 20, at 496 n.7 ("Congress wants responsible parties to pay the price of cleanup, but . . . also seeks to implement these cleanups quickly and economically . . . [H]owever . . . locating PRPs, determining liability and costs, and devising remedial measures is expensive and time-consuming.").

23. E.g., *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *Chem-Dyne*, 572 F. Supp. at 802. In actuality, as part of the CERCLA compromise, in order to secure enough bipartisan votes for passage, Congress deleted the provisions of the statute requiring joint and several liability. See Evans, *supra* note 3, at 1171.

In reasserting this standard of liability, the *Chem-Dyne* court found that statements in the legislative history led to the conclusion that Congress deleted this language in order to avoid a single mandatory legislative standard applicable to all situations. *Chem-Dyne*, 572 F. Supp. at 808. The court ruled that liability would either be applied jointly and severally if the harm was indivisible, or it could be apportioned equitably if the defendants prove the harm is

definition of a PRP²⁴ may be held liable for any or all of the remedial costs, without regard to the amount of their individual contribution. In 1986, as a part of the amendments to CERCLA, collectively known as the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),²⁵ Congress validated the courts' construction of liability.²⁶ This liability scheme allows EPA to seek enforcement actions against one or a few of the parties responsible for pollution at a toxic waste site and lets the PRPs allocate the equitable apportionment of costs amongst themselves in subsequent private recovery or contribution claims.²⁷

Under CERCLA, EPA has broad enforcement authority. EPA's first task was to collect information on toxic waste sites throughout the United States and rank and prioritize the most serious of these sites by "degree of hazard" on the National Priorities List ("NPL").²⁸ When a site is listed on the NPL, EPA may file a suit for injunctive relief or issue an administrative order, pursuant to CERCLA section 106, requiring PRPs to cleanup the targeted area.²⁹ EPA also has the option to finance the remedial action through the Hazardous Response Trust Fund ("Superfund")³⁰ and

divisible and provide the appropriate apportionment. *Id.* at 811.

24. The four enumerated categories of PRPs are listed in section 107(a)(1)-(4) of CERCLA, 42 U.S.C. § 9607(a)(1)-(4) (1994).

25. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10, 26, and 42 U.S.C.). SARA was enacted to fulfill five general goals: (1) to correct CERCLA's shortcomings, (2) to review and comment on decisions made by the courts and EPA, (3) to keep EPA's authority in check, (4) to initiate studies and long-term measures, and (5) to replenish the government's trust fund commonly referred to as the "Superfund." See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 8.2 (2d ed. 1994 & Supp. 1999).

26. H.R. REP. NO. 99-253(I), at 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856.

The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, . . . which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases.

....

The Committee believes that this uniform federal rule on joint and several liability is correct and should be followed. It is unnecessary and would be undesirable for Congress to modify [sic] this uniform rule. Thus, nothing in this bill is intended to change the application of the uniform federal rule of joint and several liability enunciated by the *Chem-Dyne* court.

Id. (citation omitted).

27. See generally Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1053-54 (1994).

28. Sites placed on the NPL are determined by criteria such as the toxicity of the waste, the amount of substances, the likelihood of exposure to people, and the actual or potential groundwater contamination. See DeMeo, *supra* note 20, at 501-02; William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,413, at 10,417 (July 1991).

29. CERCLA § 106(a), 42 U.S.C. § 9606(a). Any party who willfully fails to comply with an action under this section may be subject to government fines and punitive damages. *Id.* § 106(b), 42 U.S.C. § 9606(b).

30. See *id.* § 104(a)(1), 42 U.S.C. § 9604(a)(1) ("[T]he President [and consequently EPA are] . . . authorized to act, consistent with the national contingency plan, to remove or arrange

then seek compensation from the identified PRPs for the abatement costs, pursuant to CERCLA section 107.³¹

CERCLA section 107(a)(4)(B) also allows for compensation claims by private third parties seeking recovery of remedial response costs from PRPs.³² These actions can be brought by either innocent private parties who are not connected to the pollution of the targeted site³³ or PRPs who have previously settled with EPA³⁴ or initiated a response themselves to recover part of the remedial expenses from other responsible parties who are liable for damage to the site.³⁵

As it is impossible for the government to address all of the key sites,³⁶ this vehicle for private initiation and recovery of remediation activities is consistent with the government's goal to use CERCLA as an efficient, cost-effective solution to our nation's toxic waste problem.³⁷ To this end, the courts have unequivocally held that initial federal government involvement is not a necessary requirement to allow

for the removal of . . . such hazardous substance, pollutant, or contaminant . . .").

31. *Id.* § 107(a), 42 U.S.C. § 9607(a).

32. *Id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (holding anyone who falls into one of the four enumerated categories and causes the incurrence of response costs through a release, or threatened release, liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan").

33. Such an example are owners of property adjacent to a hazardous waste site who discover toxic substances have leaked from the site onto their property. *E.g.*, *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (5th Cir. 1997).

34. For a more detailed discussion on the ins and outs of EPA's settlements with CERCLA PRPs, see DeMeo, *supra* note 20, at 506-26. See also Fischer, *supra* note 9, at 1979.

35. See, e.g., *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990). For example, a present owner who is forced to take remedial action through an injunction may sue a previous owner to recover the equitable apportionment of costs that the party is responsible for.

In actuality, this is an oversimplification of CERCLA's contribution scheme. Prior to the enactment of SARA in 1986, courts read an allowance for contribution recovery claims into section 107. *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("District court decisions have been virtually unanimous in holding that section [107](a)(4)(B) creates a private right of action against . . . responsible parties for the recovery of 'necessary costs of response . . .'" (quoting CERCLA § 107(a)(4)(B), 42 U.S.C. § 107(a)(4)(B))). SARA codified this cause of action in section 113(f), 42 U.S.C. § 9613(f). The courts have been unclear how contribution claims between PRPs arise—whether they fall solely under the jurisdiction of section 113(f) or some combination of section 107(a) and section 113(f). See, e.g., *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (observing that "the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107"). For a discussion on how private contribution costs are allocated between the two sections, see Evans, *supra* note 3, 1172-74. This distinction is important due to the different prima facie elements and varying statutes of limitations arising under each section. Since this issue is complex enough to have inspired a few legal analyses, this Note will deal exclusively with private causes of action under section 107. However, it is important to note how the different policy considerations underlying the two sections have influenced courts' decisions whether to allow a threshold limit of liability to be applied.

36. See *supra* note 9.

37. See *supra* note 20 and accompanying text.

recovery of response costs incurred by a proactive private party.³⁸ However, if the government does have a hand in the remedial action, private parties cannot recover monies spent in response without government authorization of the cleanup.³⁹

C. Establishing a Private Party's Prima Facie Case

To date, district courts have reached a firm consensus as to what elements are needed to establish remedial liability in private recovery actions.⁴⁰ Private parties seeking to recover response costs under section 107 must show (1) the targeted area is a facility, (2) the defendant is one of four categories of covered persons, (3) a release or threatened release of a hazardous substance occurred, (4) the release or threatened release caused the plaintiff to incur response costs, and (5) the response costs were both necessary and consistent with the NCP.⁴¹

The first three categories are relatively easy to satisfy, due to both statutory construction and an abundance of early litigation in these areas.⁴² In the definitions section of CERCLA, a "facility" is described as "any site or area," including buildings, other artificial structures, or improvements, "where a hazardous substance has been deposited, stored, [or otherwise come to be located]."⁴³

Likewise, PRPs must fall into one of the four, broadly construed, enumerated

38. See *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (holding that "private enforcement actions under section 9607(a)" against identified responsible persons are "a remedy independent of . . . actions financed by Superfund"); see also *Interchange Office Park Ltd. v. Standard Indus., Inc.*, 654 F. Supp. 166, 169-70 (W.D. Tex. 1987); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 405 (W.D. Mo. 1985) (finding that section 107 "was meant to stand by itself" and . . . [is] independent of any requirements imposed under sections 111 and 112" (quoting *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 210-11 (W.D. Mo. 1985)); Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 BUS. LAW. 923, 938 (1990).

39. See Fischer, *supra* note 9, at 1996 (noting that a private party's response costs must be consistent with the National Contingency Plan ("NCP"), and citing courts that have concluded that remedial actions taken after government involvement in the site should be considered inconsistent with the NCP); see, e.g., *United States v. Hardage*, 750 F. Supp. 1460, 1519 (W.D. Okla. 1990), *aff'd*, 982 F.2d 1436 (10th Cir. 1992).

40. Federal district courts have exclusive original jurisdiction over actions brought under section 107. CERCLA § 113(b), 42 U.S.C. § 9613(b); see also *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 700-03 (D.N.J. 1988).

41. E.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152 (9th Cir. 1989); *United States v. Fairchild Indus.*, 766 F. Supp. 405, 409 (D. Md. 1991); *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1276 (W.D. Mich. 1991); PLATER ET AL., *supra* note 1, at 835; RODGERS, *supra* note 25, § 8.6, at 750.

42. See *infra* notes 43-56 and accompanying text.

43. CERCLA § 101(9), 42 U.S.C. § 9601(9) (1994); see *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 184-85 (W.D. Mo. 1985) (asserting that the definition of "facility" is intentionally expansive). For a partial listing of which courts held what structures to be "facilities," see RODGERS, *supra* note 25, § 8.6, at 758-61; Fischer, *supra* note 9, at 1998 n.106.

categories under section 107(a).⁴⁴ Section 107(a) imposes liability on four categories of PRPs: (1) the owners or operators of hazardous waste facilities,⁴⁵ (2) persons⁴⁶ who were owners or operators of hazardous waste facilities at the time of disposal,⁴⁷ (3) persons who arrange for disposal or treatment of hazardous wastes,⁴⁸ and (4) transporters of hazardous wastes.⁴⁹ "In short, the courts have broadly construed Section 107(a) to impose liability not only on those parties closely connected to the hazardous substance, but on nearly everyone even remotely involved, regardless of whether they were physically or morally responsible for the environmental harm."⁵⁰

Further, the courts have also construed the meaning of the third element in the *prima facie* case broadly.⁵¹ A "release" occurs whenever a toxic substance is found at a facility,⁵² and a "threatened release" occurs if substances are stored in an unsafe

44. For a more detailed discussion of courts' fact-based, case-by-case decisions on who constitutes a PRP, see RODGERS, *supra* note 25, § 8.7.

45. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). Courts have held that this category includes current owners without any connection to the hazardous substance. *See, e.g.,* Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1280-81 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). However, after the SARA amendments, courts have found an exception to this in the narrow innocent-landowner defense under section 107(b)(3). *E.g.,* Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 767 F. Supp. 456, 457-59 (W.D.N.Y. 1991), *aff'd*, 964 F.2d 85 (2d Cir. 1992).

46. A "person" is defined to include individuals, corporations, firms, associations, partnerships, consortiums, joint ventures, and commercial entities. CERCLA § 101(21), 42 U.S.C. § 9601(21).

47. *Id.* § 107(a)(2), 42 U.S.C. § 9607(a)(2); *see, e.g.,* United States v. Mexico Feed & Seed Co., 764 F. Supp. 565, 571 (E.D. Mo. 1991), *aff'd in part and rev'd in part on other grounds*, 980 F.2d 478 (8th Cir. 1992).

48. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). Courts have held that liability as an "arranger" under section 107(a)(3) requires proof (1) that the arranger disposed of toxic waste (2) at a targeted facility, which contains at the time of discovery the kind of toxic waste the arranger disposed, and that (3) the release or threatened release of that or any toxic waste (4) triggers the incurrence of response costs. *Violet v. Picillo*, 648 F. Supp. 1283, 1289 (D.R.I. 1986), *overruled on other grounds sub nom. United States v. Davis*, 794 F. Supp. 67 (D.R.I. 1992). Notice that personal ownership or actual physical possession of the toxic waste or the facility does not determine "arranger" liability. *See United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743-44 (8th Cir. 1986).

49. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). However, this category only holds transporters liable if they choose the disposal or treatment sites. *E.g., United States v. W. Processing Co.*, 756 F. Supp. 1416, 1419-20 (W.D. Wash. 1991).

50. Fischer, *supra* note 9, at 2003-04 (discussing the various entities liable as potential defendants under section 107(a)). In fact, Fischer asserts that it is this broad range of liability, as well as the retroactive application of liability, that is the prime example of congressional intent to remedy toxic waste sites regardless of concerns of fairness. *Id.* at 2004.

51. *See* RODGERS, *supra* note 25, § 8.6, at 750-58 (discussing in detail both provisions of the third element).

52. CERCLA § 101(22), 42 U.S.C. § 9601(22) (defining a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment"); *see Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670 (5th Cir. 1989) (noting that based on this definition, all the plaintiff essentially needs

manner.⁵³ "Nearly everything is a hazardous substance under CERCLA . . . [E]ven a single copper penny . . . can result in CERCLA liability."⁵⁴ Correspondingly, courts have unequivocally held that threshold amounts or concentrations of substances are of no relevance when listing a substance as a hazardous material under CERCLA.⁵⁵

Accordingly, it is within the proof of the two remaining elements where CERCLA private-party defendants have attempted to achieve some threshold limit on their liability. The rest of this Note examines cases interpreting and responding to claims brought under the requirements that the response costs are consistent with the NCP, have been incurred in response to a release or threatened release, and are "necessary" under section 107(a)(4)(B).

III. THE SEARCH FOR LIMITED LIABILITY

The requirement that private response costs be consistent with the NCP⁵⁶ has been dealt with rather extensively through early CERCLA litigation. Therefore, the discussion on this element will be brief, and this Part will focus on the more controversial (and interesting) disputes over whether a threshold level of liability can be implied through either the "causation of incurred responses" requirement or the definition of the term "necessary."⁵⁷

A. What Response Costs Are Consistent with the National Contingency Plan?

The NCP is a body of regulations promulgated by EPA to govern the cleanup of CERCLA toxic waste sites.⁵⁸ A private party has proven the consistency of their response when "the action, . . . evaluated as a whole, is in substantial compliance with the applicable requirements . . . and results in a CERCLA-quality cleanup."⁵⁹ The

to show is the presence of hazardous substances at the facility).

53. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (finding hazardous substance stored in corroding drums counted as a threatened release, especially as the defendant lacked training in the handling and storage of toxic materials).

54. Fischer, *supra* note 9, at 1999-2000 & nn.109 & 111 (listing all of the various environmental statutes from which CERCLA draws its definition of "hazardous substance" under section 101(14), and citing *United States v. Wade*, 557 F. Supp. 1326, 1340 (E.D. Pa. 1983)). This is Fischer's over-the-top way of emphasizing the point that CERCLA's definition of "hazardous substance" has almost no limits within the realm of environmental law.

EPA also has the power under section 102(a) to designate as hazardous any substances that may present substantial danger to the public health, welfare, or the environment when released. See 40 C.F.R. § 302.4 (2000).

55. E.g., *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396, 398 (5th Cir. 1997); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3d Cir. 1992); *Amoco*, 889 F.2d at 669.

56. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

57. *Id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).

58. 40 C.F.R. § 300; see also *Southfund Partners III v. Sears, Roebuck & Co.*, 57 F. Supp. 2d 1369, 1380 (N.D. Ga. 1999).

59. 40 C.F.R. § 300.700(c)(3)(i). An action will not be inconsistent with the NCP due to "immaterial or insubstantial deviations" from these requirements. *Id.* § 300.700(c)(4).

applicable requirements mentioned differ depending on whether the response action is construed as "removal"⁶⁰ or "remedial."⁶¹

Remedial actions (those that are most likely to be litigated in a private recovery action) are subject to four primary requirements detailed through extensive regulation.⁶² These requirements are listed as follows:⁶³ (1) identification of applicable or relevant and appropriate requirements ("ARARs");⁶⁴ (2) evaluation of the remedial site (consisting of two steps, a remedial preliminary assessment ("PA") and a remedial site inspection ("SI"));⁶⁵ (3) remedial design ("RD");⁶⁶ and (4) remedial action ("RA"), operation, and maintenance of the selected remedy.⁶⁷ In addition, private remedial actions must achieve "CERCLA-quality" standards.⁶⁸ These requirements are so extensively regulated that it is difficult to construe this element to imply a threshold limit of liability. Since private PRPs bear the burden of proving consistency (rather than proving remediation was not inconsistent) with such a well-defined set of requirements, there is little room for interpreting a limitation of liability in this element of the statute.

B. Does a Causation Requirement Exist Under Section 107(a)(4)?

In contrast, the fourth element for a private plaintiff's prima facie case, establishing that the release or threatened release caused the plaintiff to incur the response costs,⁶⁹ has not been analyzed to exclude potential court interpreted liability limitations. Since the decision handed down in *Amoco Oil Co. v. Borden, Inc.*,⁷⁰ this statutory provision has been key to suggesting a threshold for liability. Courts have struggled over whether such a threshold is implied. The significant difficulty underlying the assignment of a threshold through this section rests in the various contexts in which a causation requirement could be interpreted through section 107(a).⁷¹

60. Actions taken when an immediate threat demands rapid action. *Southfund*, 57 F. Supp. 2d at 1380 n.7.

61. That is, actions that are, in comparison, more substantive, complex, and provide a more permanent cure. *Id.*

62. 40 C.F.R. §§ 300.400, .430, .435.

63. The following list is as summarized by the court in *Public Service Co. v. Gates Rubber Co.*, 22 F. Supp. 2d 1180, 1190 (D. Colo. 1997). For a more exhaustive discussion on private response costs consistent with the NCP, see RODGERS, *supra* note 25, §§ 8.3-.5; William B. Johnson, Annotation, *Application of Requirement in § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9607(a)) That Private Cost-Recovery Actions Be Consistent with National Contingency Plan*, 107 A.L.R. FED. 562 (1992).

64. 40 C.F.R. § 300.400(g).

65. *Id.* § 300.430.

66. *Id.* § 300.435.

67. *Id.*

68. National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8793 (Mar. 8, 1990).

69. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1994).

70. 889 F.2d 664 (5th Cir. 1989).

71. See *id.* at 670 & n.8 (distinguishing the question of whether a release caused the incurrence of response costs from the issues of establishing a causal link between costs incurred

Some courts have discussed the issue of causation in terms of whether a responsible party created the hazardous waste site by contributing a threshold amount of hazardous material and therefore "caused" the response (and cost) with a specific hazardous substance.⁷² These courts relate the idea of causation of CERCLA remediation costs to a quantifiable amount or type of hazardous pollution. This interpretation has been deemed unallowable under CERCLA.⁷³

Other courts discuss causation in terms of whether costs incurred were directly related to protecting human health and the environment from hazardous materials.⁷⁴ In other words, the cleanup costs are not associated with any particular amount of hazardous substance, but rather with the risk posed by the contamination at the site. This interpretation is the one initially articulated by the court in *Amoco*⁷⁵ and is more suitable for upholding the ideals behind the statute while, at the same time, establishing a reasonable threshold on private liability. The *Amoco* court reasoned that to construe CERCLA liability without relating it to the threat caused by the release would exceed the statutory purpose by imposing liability on parties that have not harmed the public or the environment.⁷⁶

If privately initiated response costs are not directly related to the threat the site causes to health and the environment, then they should not necessarily fall under the domain of CERCLA litigation. By focusing the court's inquiry on the relationship between the hazard and the risk, *Amoco*'s interpretation balances the three competing interests mentioned at the beginning of this Note.⁷⁷ The public's health and environmental interests are directly addressed, the government's efficiency interest is met by providing relief only for response costs that impact the good of the public, and the PRPs' fears of inequitable liability are allayed because, if there is no risk, they are not responsible for response costs.

However, due to the confusion over the various "causation contexts," as mentioned above, *Amoco*'s interpretation of a threshold of liability into the "caused response costs to be incurred"⁷⁸ provision has been lost. For example, both the First and Fifth Circuits have cited *Amoco* in disagreeing with their respective district courts'

and an individual PRP, and holding PRPs strictly liable for releases without regard to causation).

72. See, e.g., *Acushnet Co. v. Coaters, Inc.*, 937 F. Supp. 988 (D. Mass. 1996) (refuting the contention made in *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985), that including a causation requirement in section 107(a) renders the three affirmative defenses found in section 107(b) superfluous), *aff'd on different grounds sub nom. Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999).

73. See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992) (holding that CERCLA imposes no threshold concentration or amount requirement); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1155 (1st Cir. 1989) (finding that in multiple sources of contamination, a plaintiff does not have to show a specific causal link between costs incurred and a specific generator's wastes).

74. See, e.g., *Amoco*, 889 F.2d at 670-71.

75. *Id.*

76. *Id.*

77. See *supra* text accompanying notes 7-9.

78. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1994).

reasoning, finding an *Amoco*-type threshold of liability under section 107(a)(4).⁷⁹

Added to this confusion is the refusal of CERCLA proponents to allow a causation element to be interpreted into their strict, joint and several liability scheme. As previously mentioned, CERCLA was designed for joint and several liability purposes.⁸⁰ Inherent in this liability scheme is the "polluter-pays" principle,⁸¹ one of the cornerstones of CERCLA authority.⁸² Due to the various types of parties that may be either defendants or plaintiffs in private-party litigation,⁸³ and considering that most hazardous waste sites have multiple PRPs, comingling these ideals with a fact-based causation element can lead to contradictory decisions based on differing policy concerns.⁸⁴

All of that confusion and quibbling over terms and definitions leads to the conclusion that it is imperative to find a different provision that will more succinctly express *Amoco's* interpretation of liability thresholds.

C. What Are "Necessary" Costs of Response?

In the early part of CERCLA's litigation history, the section 107(a)(4)(B)⁸⁵ requirement that a private party may only recover the "necessary costs of response" did not receive much judicial attention.⁸⁶ As neither the NCP nor CERCLA defines costs that are "necessary," courts have adopted a case-by-case, fact-based method to determine whether incurred response costs were "necessary," rather than developing a restrictive definition of the term.⁸⁷ Courts have traditionally defined "necessary" as "logically unavoidable" but "uncompelled by the [EPA],"⁸⁸ focusing instead on whether incurred costs were part of an allowable recovery action.⁸⁹

79. See *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999), *aff'g on other grounds* *Acushnet Co. v. Coaters, Inc.*, 937 F. Supp. 988 (D. Mass. 1996); *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (5th Cir. 1997), *rev'g* 111 F.3d 396 (5th Cir. 1997).

80. *Supra* note 23 and accompanying text.

81. *Supra* note 1.

82. *Supra* notes 20-22 and accompanying text.

83. For example, a private CERCLA plaintiff may be either an innocent third party or a PRP, *see supra* notes 32-35 and accompanying text, while a defendant might be any type of PRP, regardless of their extent of pollution in comparison with other PRPs or other fairness concerns.

84. Compare *Acushnet*, 191 F.3d at 69 (noting that in a contribution type of action, a de minimis PRP does not really cause another, larger plaintiff PRP to incur response costs), with *Licciardi*, 111 F.3d at 396 (basing the court's decision on the policy concerns inherent in an innocent third party, rather than a PRP).

85. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1994).

86. Reitze et al., *supra* note 9, at 399; Kyle E. McSarrow et al., *A Decade of Superfund Litigation: CERCLA Case Law from 1981-1991*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,367, 10,401 (July 1991).

87. See Reitze et al., *supra* note 9, at 399-400; *see also* *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (noting the difficulty arising in applying section 107(a)(4)(B), as CERCLA does not define "necessary costs of response").

88. *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1107 (N.D. Ill. 1988).

89. See *supra* note 86.

As an example of the early courts' dismissals of a more useful meaning for the term "necessary," the Eighth Circuit in *General Electric Co. v. Litton Industrial Automation Systems, Inc.*,⁹⁰ held that the term included any of the cleanup costs mandated by the NCP and any expenses incurred in compliance with state standards.⁹¹ In court, Litton tried to advance the argument that General Electric's response costs were not "necessary," but rather were incurred to enhance the value of the property.⁹² While later courts have ruled on this issue, determining that CERCLA plaintiffs cannot impose their own value enhancing "fixer-upper" costs on PRPs,⁹³ the *Litton* court held that General Electric's costs were incurred merely trying to achieve state-imposed environmental standards.⁹⁴ As the response costs were mandated by state law, and subsequently by the NCP,⁹⁵ General Electric was allowed to recover those cleanup expenditures that were deemed consistent.⁹⁶

Given that consistency with the NCP is already one of the previous requirements of proving prima facie CERCLA liability,⁹⁷ this "new" reading into the statute seems both redundant and unnecessary. Recent case law sheds light on this seeming redundancy and brings to life a new possibility to impose a bottom-line threshold of CERCLA liability, using similar reasoning as the unsuccessful "causation attempt"⁹⁸ but being better suited to balance the competing interests central to any CERCLA litigation.⁹⁹

In *Southfund Partners III v. Sears, Roebuck & Co.*,¹⁰⁰ the court held that private litigants' response costs are only "necessary," and therefore recoverable, if the plaintiff shows "(1) that the costs were incurred in response to a threat to human health or the environment that existed prior to initiation of the response action and (2) that the costs were necessary to address that threat."¹⁰¹ Under this standard, the court held that Southfund had not fulfilled its burden of proving that the costs incurred to clean the groundwater¹⁰² and soil were necessary to address threats to the public's

90. 920 F.2d 1415 (8th Cir. 1990).

91. *Id.* at 1421.

92. *Id.*

93. See, e.g., *Southfund Partners III v. Sears, Roebuck & Co.*, 57 F. Supp. 2d 1369, 1378-79 (N.D. Ga. 1999); see also, e.g., *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 561 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995) (explaining that owners cannot remove contamination solely to upgrade the use of the property and then recover response costs from someone else under CERCLA).

94. *Litton*, 920 F.2d at 1421.

95. See Reitze et al., *supra* note 9, at 399.

96. *Litton*, 920 F.2d at 1421.

97. See *supra* Part III.A (discussing the requirement that private response costs be consistent with the NCP).

98. See *supra* notes 72-73 and accompanying text.

99. See *supra* text accompanying notes 7-9.

100. 57 F. Supp. 2d 1369 (N.D. Ga. 1999).

101. *Id.* at 1378.

102. The court held that Southfund failed to show that any of the contaminated groundwater flowed into any sources of drinking water, leaked into any downstream creeks, lakes, or ponds, or subsequently adversely affected human health, animals, or plants. *Id.* at 1379 (citing *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 905 (5th Cir. 1993), and *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, No. CIV.A. 94-0752, 1996 WL 557592, at *50-*52 (E.D. Pa. Oct. 1,

health or the environment.¹⁰³ The evidence showed the contaminated soil was covered by asphalt, enclosed by a fence and was not even considered to be worthy of remedial efforts by the state department of natural resources.¹⁰⁴

This requirement that response action expenditures may only be recoverable if undertaken to protect human health and the environment has been supported by other recent district court decisions¹⁰⁵ and stems from the requirements set forth in subpart H of the NCP.¹⁰⁶ As the Ninth Circuit points out, this inquiry focuses on the nature of the threat imposed and is factually specific.¹⁰⁷ However, another court has recently rejected *Amoco's* similar "protection-based" theory of causation,¹⁰⁸ arguing that "[t]o fashion a quantitative minimum threshold for CERCLA liability under the guise of a non-statutory 'justification' theory is to undo the policy decision Congress has already made."¹⁰⁹ However, this same decision supported a limitation imposed by CERCLA's "necessary" requirement.¹¹⁰

This conflict exemplifies why a "necessary" limitation is imminently preferable to a causation requirement as a bottom-line threshold of CERCLA private liability. Not only is the theory supporting this limitation similar to the reasoning set forth behind

1996)).

103. *Id.* at 1379.

104. Prior to the initiation of this action, Southfund argued for and obtained removal of the site from Georgia's Hazardous Site Inventory ("HIS") listing, based on mitigating factors such as the ones enumerated by the court in denial of the plaintiff's claim for recovery. *Id.* at 1372, 1379. However, the court did not stop there, extending the definition of "necessary" to require a violation of a state standard. *Id.* at 1379 ("Without any evidence [Georgia's] DNR required the remedial efforts undertaken to ameliorate the effects of contamination, no reasonable juror could find the response costs to be necessary." (citing *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 990 F. Supp. 1188, 1193 (C.D. Cal. 1997) (finding that the plaintiff's voluntary response costs were not necessary because the regional environmental authority would not have ordered remedial action on its own), *aff'd in part and rev'd in part*, 227 F.3d 1196 (9th Cir. 2000), *reh'g en banc granted* by 240 F.3d 841 (9th Cir. 2001))).

105. *See, e.g.,* *Marriott Corp. v. Simkins Indus.*, 929 F. Supp. 396, 403 (S.D. Fla. 1996) (finding that the plaintiff's expenditure to expand its excavation in removing industrial wastes from the site was a necessary response to a threat to the public health and the environment).

106. 40 C.F.R. § 300.700 (2000). In part, the regulations contend that the response costs will be deemed consistent with the NCP if they result in "CERCLA-quality cleanup." *Id.* § 300.700(c)(3)(i). The comment accompanying subpart H states that a "CERCLA-quality cleanup" is one that (among other requirements) is "protective of human health and the environment." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8793 (Mar. 8, 1990). Courts that have read the "protective" definition into the term "necessary" have done so pursuant to the accepted NCP standards.

107. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1203 (9th Cir. 2000) (holding that the intent of the private plaintiff and the agency's action or inaction were not wholly indicative of the threat), *reh'g en banc granted* by 240 F.3d 841 (9th Cir. 2001).

108. *See supra* notes 74-77 and accompanying text.

109. *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000).

110. *Id.* at 963-64. However, I disagree with the court's assessment that this requirement is met if the private plaintiff had a "reasonable belief that the defendant's release . . . would contaminate his property." *Id.* at 964.

the causation threshold,¹¹¹ but also it avoids many of the conflicts inherent in placing limitations on the causation requirement.¹¹² Furthermore, a "necessary" threshold under section 107(a)(4)(B) is better equipped to further and balance both CERCLA's primary goals¹¹³ and the three competing interests mentioned in the Introduction.¹¹⁴

Once again, those three competing interests are (1) the PRPs' interests in limiting the exorbitant response costs they often face without regard to fairness of allocations of costs; (2) the public's concern over the hazards associated with the lingering toxic waste sites; and (3) the government's interest in achieving an efficient and cost-effective method of response through private remedial and recovery activities.¹¹⁵ Interpreting section 107(a)(4)(B)'s "necessary" response cost requirement as a definitive threshold to liability accomplishes all three of these stated interests. As the single *prima facie* element that the courts have not construed broadly, this provision offers protection for those PRPs whose dumping or waste management activities are not dangerous to society's welfare.¹¹⁶

Additionally, the courts' explicit recognition of a standard that calls for the protection of human welfare and the environment¹¹⁷ addresses the public's concerns that dangerous hazardous waste sites not be left unattended and ignored. Finally, an efficient and cost-effective method of response actions is bound to develop through future case law, as private plaintiffs seek to document¹¹⁸ and minimize the response costs they will be called on to justify.¹¹⁹

For all of these reasons, this Note emphasizes and encourages future courts and Congress to take heed of *Southfund*'s articulated threshold of CERCLA liability and to extend it in furtherance of future statutory reform.

IV. CONCLUSION

During PRPs' search to limit their possible exorbitant CERCLA liability over the past twenty years of private-party litigation, the question has been raised whether polluting entities even deserve to have a threshold level of liability asserted. The answer to this question has typically been answered along partisan lines,

111. See *supra* notes 74-77 and accompanying text; see also *Carson Harbor*, 227 F.3d at 1207-10.

112. See *supra* notes 79-84 and accompanying text.

113. See *supra* notes 21-22 and accompanying text.

114. See *supra* text accompanying notes 7-9.

115. See *supra* text accompanying notes 7-9.

116. This protection would alleviate the concerns expressed by Fischer that "even a single copper penny" could trigger CERCLA liability. See *supra* note 54 and accompanying text.

117. Protection extends even to various plant and animal inhabitants downstream from a hazardous waste facility. Cf. *Southfund Partners III v. Sears, Roebuck & Co.*, 57 F. Supp. 2d 1369, 1379 (N.D. Ga. 1999).

118. See, e.g., *Reitze et al.*, *supra* note 9, at 400-01 ("[A] private action plaintiff who fails to document the reasons for cleanup expenditures falls short of meeting the 'necessary' burden. A mere list of expenses, without any reasonable basis to demonstrate the necessity of the costs, does not fulfill the burden.").

119. Cf. *Southfund*, 57 F. Supp. 2d at 1379-80 (placing the burden of establishing that a response cost should be considered "necessary" squarely on the shoulders of the plaintiff).

depending on whether one is advocating for the government, a plaintiff seeking to recover costs, or environmental groups on one hand, or for industry, property owners, or CERCLA defendants on the other.

Considering this question from both sides of the proverbial fence, this Note answers: "Yes, a necessary threshold of liability should be implemented." Considering CERCLA's broadly construed, strict liability scheme, it is desirable and possible to require a threshold level of liability under the *Southfund* "necessary" standard while still retaining CERCLA's two primary goals of quick and efficient responses to toxic wastes, the costs of which are allocated to the responsible polluters.